United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2004; 74-2041

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Respondent,

vs.

BEN J. SLUTSKY and JULIUS SLUTSKY, d/b/a "THE NEVELE,"
Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPELLANTS' BRIEF

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Preliminary Statement

Ben Slutsky, age 65 and Julius Slutsky, age 64, were each sentenced to five years in prison for income tax evasion. Their convictions were affirmed by this Court and a petition for certiorari was denied.

The government's theory of prosecution was based upon the bank deposit method of reconstructing income without

any showing of any specific items of omitted income. A motion for a new trial was based on newly discovered evidence showing the entire deficiency charged was explained by the cashing of payroll checks which were re-deposited in the appellants' business account (The Nevele Hotel). The first appeal is from a denial of this motion.

A second motion for reduction of sentence urged that the appellants' punishment be modified because of its extreme severity and the serious illness of Ben Slutsky. It was shown that the sentence imposed under § 4208(a)(2) was inoperative since the parole board's statistics conclusively show that the average person receiving a 4208(a)(2) sentence serves *more time* in prison than a man who receives a "regular" sentence. Thus, it was argued that the court, unaware of these facts, made a mistake of fact in sentencing and accordingly should reassess the sentence in light of this circumstance. The second appeal is from a denial of this motion.

A motion to consolidate the appeals was granted by this Court on the 8th day of August, 1974.

Questions Presented

1. Whether the appellants' sentence should be vacated because it is based upon a mistake of fact and was mechanically imposed?

2. Whether the district court abused its discretion in imposing such a harsh sentence upon the appellants and whether this Court should reduce it?

3. Whether the trial court's denial of a hearing in connection with a motion for a new trial was error where there was presented issues of fact?

Statutes Involved

18 U.S.C. § 4208. Fixing eligibility for parole at time of Sentencing

(a) Upon entering a judgment of conviction, the court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interests of the public require that the defendant be sentenced to imprisonment for a term exceeding one year, may

. . .(2) . . . fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may become eligible for parole at such time as the board of parole may determine.

• • •

Federal Rules of Criminal Procedure

Rule 33. New Trial

The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

As amended Feb. 28, 1966, eff. July 1, 1966.

Rule 35. Correction or Reduction of Sentence

The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence. The court may reduce a sentence within 120 days after the sentence is imposed, or within 120

days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction. The court may also reduce a sentence upon revocation of probation as provided by law. As amended Feb. 28, 1966, eff. July 1, 1966.

Statement of Facts

The voyage of Ben and Julius Slutsky through the federal court system has been long and arduous. Some of that history must be reviewed in order to place the issues raised in this appeal in proper prespective. We have recruited only the most essential facts from this Court's archives in support of our claims here.

Historical Events

In 1972 Ben and Julius Slutsky were indicted by a grand jury in the Southern District of New York for attempted income tax evasion and the filing of false tax returns in violation of §§ 7201 and 7206 of Title 26 of the United States Code. They were found guilty on January 9, 1973 after a jury trial, and on March 19, 1973 were sentenced to five years imprisonment by the Hon. Lloyd F. MacMahon.*

On September 24, 1973 this Court affirmed the appellants' convictions for tax evasion but vacated the false filing convictions. *United States* v. *Slutsky*, 487 F.2d 832 (2d Cir. 1973). On April 15, 1974 the United States Supreme Court denied a petition for certiorari.

* A $40,000 fine was imposed on Ben Slutsky and a $35,000 fine was levied against Julius Slutsky. In addition, the costs of the prosecution were taxed against each of the appellants.

Motion for a New Trial

In October of 1973, after this Court affirmed appellants' convictions, E. Stewart Jones of Troy, New York and Herald Price Fahringer of Buffalo, New York were engaged to prepare and file the petition for certiorari in the United States Supreme Court.*

In order to adequately understand the case, counsel traveled to the Nevele Hotel and personally examined many of the transactions relating to the taxable years 1965, 1966 and 1967, which were the subject of appellants' original indictment (25).** At that time a financial statement of Nevele Acres, dated December 31, 1973, showing an obligation due and owing *from* the Nevele Hotel to Nevele Acres in the amount of $1,168,099.48, was accidentally discovered (25).*** This entry caught counsel's attention and an investigation of this liability disclosed, for the first time, that large transfers of funds were made *from* the Nevele Acres to the Nevele Hotel for the purpose of cashing payroll checks. Pursuing further this startling development, it was learned that other companies, unconnected with the Nevele Hotel, furnished large sums of funds to the Nevele for the purpose of fulfilling the large cash demands needed to fund the payroll cashing operation (25).

The accounting firm of Haskins & Sells was immediately engaged to fully investigate this newly discovered evidence, and after several months of examining the accounts of the Nevele Hotel, they concluded that $1,550,335 in payroll checks had been processed through the Nevele general

* Appellants were represented by Louis Bender and Moses Kove, both of New York City, through the trial proceedings and the first appeal to this Court.

** Refers to pages of the appellants' appendix.

*** Nevele Acres owns race horses (trotters) and enjoyed large profits during 1973.

checking account (57). All this money, which was clearly non-income, was charged by the government to the Nevele Hotel as *income*! The importance of this decisive disclosure can only be assessed by viewing it in the light of the whole case.

The Government's Theory of Prosecution

In 1969 the Internal Revenue Service began a tax investigation of the Nevele Hotel using soley as its basis the bank deposit method of reconstructing income. The investigation eventually focused on the two major business accounts maintained by the Nevele Hotel in the First National Bank and Trust Company of Ellenville and the Ellenville National Bank.*

The deposits in these two central accounts for the years 1965 through 1967 totaled close to $15 million.** The government chose only to investigate deposits in these accounts of checks *over* $1,000, which totaled $5.3 million. The government found that $3.8 million consisted of non-income items. Accordingly, it merely reduced the total deposits of approximately $15 million by $3.8 million and charged the balance of $11 million to gross receipts.*** This amount was then discounted by the direct costs, expenses and depreciation claimed on appellants' tax return. Without investigating additional non-income deposits, for which

* The four other bank accounts explored by the government were: a bank account in the Sullivan National Bank; a savings account under the name of Julius and Ben Slutsky; a Julius or Alice Slutsky checking account; and an Alice Slutsky checking account. The latter three accounts are maintained in the Ellenville National Bank.

** For ease of comprehension we have rounded off all the bank deposit figures. The actual amount of the deposits was $14.8 million in the First National Bank and Trust Company and the National Bank. These facts are, for the most part, set forth in this Court's opinion at 487 F.2d at 832.

*** The $11 million consisted of $1.5 million in checks *over* $1,000; $8.5 million in checks *under* $1,000; and $1 million in cash.

explanations were furnished by appellants, the government arbitrarily claimed $1.2 million as unreported income.

As this Court will recall, the government flatly refused to investigate the appellants' leads concerning the $8.5 million in checks under $1,000, which included the $1.2 million charged in the indictment. Consequently, it is undisputed that this huge amount charged as income against the appellants was never verified. When the government was asked why they had not investigated the $8.5 million in checks, they merely stated, "It would require the examination of hundreds of thousands of boxes of microfilms" (318).* Significantly the government admitted that they had the manpower to conduct such an investigation, but declined to do so because they assumed all the money deposited in these business accounts was income (318, 327).** This Court acknowledged this unverified claim of income by stating:

> "Almost $8.6 million, however, was in unidentified items, and a further $1 million was in currency. Appellants' principal attack on the sufficiency of the government's investigation focuses on this large sum of unidentified checks and currency charged as income." (487 F.2d at 841)***

In essence, the government simply charged this huge amount of deposits to the appellants' income. The following chart illustrates the enormity of this miscalculation on the part of the government.

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* Refers to pages of the appendix filed with this Court in the first appeal.

** Refers to pages of the appendix filed with this Court in the first appeal.

*** The government for the first time in their brief in this Court claimed that they identified, but did not investigate, 1,447 checks out of the $8.5 million amount. However, they only verified *eight* of the 1,447 checks.

$14.8 Million Total Deposits in the
First National Bank & Trust Company and
the National Bank of Ellenville
for the Years 1965 through 1967

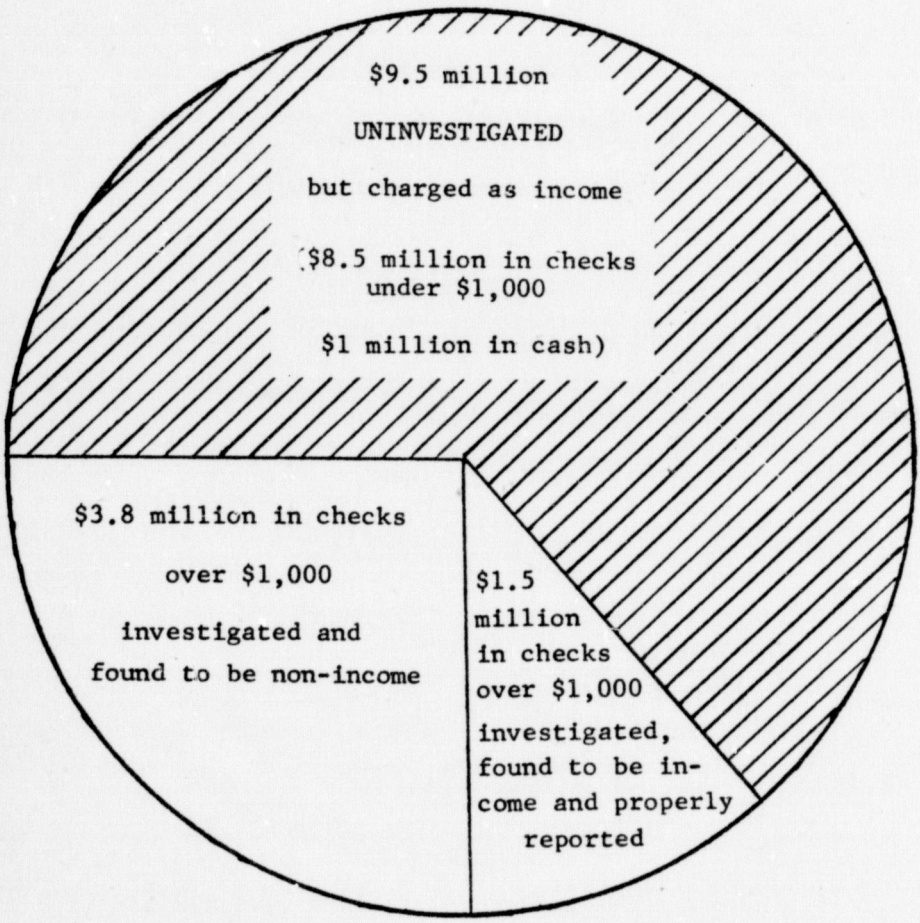

Chart originally set forth in Appellants' Motion for a New Trial; see Appendix page 12.

The government investigated the savings accounts in the names of Ben Slutsky and Julius and Alice Slutsky at the Ellenville National Bank and never claimed that any of the money deposited in these accounts was unreported.

The government never proved any specific item of income which was unreported. In other words, no direct evidence was ever presented showing that either of the appellants failed to report a single penny of earned income. Only the most questionable inferences were drawn by the government from the circumstantial evidence of over $8 million of checks and cash deposited in these business accounts. Accordingly, the government erroneously concluded that the following amounts of income were unreported for the years in question:

	Unreported Income	*Tax Due*
1965	$ 399,177.21	$199,588.60
1966	477,910.47	239,955.23
1967	354,975.32	177,487.66
	$1,232,063.00	$617,031.59

Through the newly-discovered evidence we are now able to show that this *entire* amount of allegedly unreported income can be fully and completely explained by the government's failure to take into account the cashing of payroll checks through the general business account.

Cashing of Payroll Checks

The Nevele Hotel has anywhere from 300 to 400 employees during the course of the year, depending upon the season (15). The hotel is located in a remote area of the Catskills, so that over 90 percent of the employees cash their

payroll checks through the hotel (15). There is a paymaster who every week has in his possession each employee's paycheck (15). The paydays for each week are Sunday and Monday (15). On these days the employees report to the paymaster's office located in the Nevele Hotel's main offices, obtain their checks, endorse them, and return them to the paymaster, who disburses their pay in currency and coin (15).

The currency used to cash the employees' paychecks came from an independent, non-income source which relates directly to the newly-discovered evidence. At the end of each payday, the paymaster would take the cashed checks, which were sorted in small bundles of approximately 25 each, with an adding machine tape showing the total amount of those checks wrapped about the collection, and would deliver them to the front office where they would be assembled (16). On Monday, Tuesday or perhaps Wednesday these payroll checks would be deposited, together with the day's guest receipts (16).

The deposit slip for the Ellenville National Bank would simply list the total of the payroll checks, together with groups of checks received from guests in payment for their bills (16). As an illustration, there follows a deposit slip used by the Nevele Hotel for their deposits made in the Ellenville National Bank which was made a part of our motion for a new trial (17).

DEPOSITED IN

ELLENVILLE NATIONAL BANK

ELLENVILLE, N. Y.

BY Nevele

7/24 1965

PLEASE FILL IN → YOUR ELECTRONIC CODE NUMBER

PLEASE LIST EACH CHECK SEPARATELY

	DOLLARS	CENTS
CURRENCY	750	
SILVER		
CHECKS AS FOLLOWS		
packs of checks representing payment of guest bills	3,725	18
	2,162	50
	1,823	10
	2,103	80
	1,837	80
packs of pay-roll checks deposited	2,314	35
	2,003	08
	1,634	52
	2,392	12
	1,939	87
	1,725	30
TOTAL $	24,411	62

SEE THAT ALL CHECKS AND DRAFTS ARE ENDORSED

(form has been folded to fit on page)

Exhibit originally set forth in Appellants' Motion for a New Trial; see Appendix page 17.

The payroll checks deposited in the Nevele bank account were not identified on the deposit slips and on the bank statements. Since the government only investigated checks deposited over $1,000, all these payroll checks were *included* in the government's audit as income under their bank deposits theory of prosecution.

As we will point out later in greater detail, the currency needed to cash these payroll checks had to be secured from sources other than daily guests receipts and the Nevele funds in the Ellenville National Bank because of the large payroll demands. Over 90 percent of the guests paid their bills by check, so there was rarely enough cash from that source to be utilized in cashing the payroll checks (16). The bank account of the Nevele Hotel rarely had sufficient surplus funds to be used to meet the large payroll cashing demands. As a consequence, the currency used to cash the payroll checks had to be secured from an outside source, which we were fully prepared to document at a hearing, had one been granted in this case.

Haskins & Sells, one of the most reputable accounting firms in the nation, was engaged to audit these accounts and prepare a schedule of the Nevele payroll checks cashed and deposited in their checking account. The following charts show the payroll checks cashed and deposited in the Nevele checking account and erroneously charged against the appellants as income. These figures were fully verified by Haskins & Sells (56). The charts also contain a list of other "disbursement checks" which were deposited in the Nevele checking account and were wrongfully charged to them as income under the government's bank deposit theory of prosecution.

Nevele Checks Cashed and Deposited
In the Nevele Checking Account

1966

	Payroll Checks	*Other Disbursement Checks*
January	$ 37,560	$ 7,488
February	32,053	8,473
March	41,018	5,284
April	37,815	8,328
May	36,439	19,002
June	49,385	3,333
July	45,937	10,197
August	57,571	10,763
September	46,382	10,460
October	41,318	22,785
November	51,713	13,344
December	32,475	4,127
	$509,666	$123,584

SUMMARY—1966

Payroll Checks	$509,666	
Other Checks	123,584	
Total	$633,250	
	$477,910.47	Amount charged by government as unreported income

Nevele Checks Cashed and Deposited
In the Nevele Checking Account

1965

	Payroll Checks	*Other Disbursement Checks*
January	$ 26,415	$ 5,768
February	29,440	3,043
March	36,855	6,173
April	32,189	5,218
May	34,406	2,757
June	43,124	5,331
July	40,550	2,347
August	50,673	12,846
September	40,481	14,852
October	40,064	8,632
November	42,699	12,660
December	32,024	5,070
	$448,920	$ 84,697

SUMMARY—1965

Payroll Checks	$448,920
Other Checks	84,697
Total	$533,617
	$399,177.21

Amount charged by government as unreported income

Nevele Checks Cashed and Deposited
In the Nevele Checking Account

1967

	Payroll Checks	*Other Disbursement Checks*
January	$ 37,881	$ 21,154
February	37,468	8,752
March	45,749	4,515
April	35,515	15,369
May	45,406	8,275
June	58,979	13,127
July	52,005	6,553
August	62,404	15,740
September	54,688	7,160
October	64,752	14,614
November	51,576	10,127
December	45,326	3,467
	$591,749	$128,853

SUMMARY—1967		
Payroll Checks	$591,749	
Other Checks	128,853	
Total	$720,602	
	$354,975.32	Amount charged by government as unreported income

As shown by these charts, the cashing of the Nevele payroll checks and the depositing of them in the Nevele checking account *exceeds* the tax deficiency charged for each of the years alleged in the indictment. And, of course, the total Nevele checks cashed exceeds the unreported income in even a greater amount.

	1965	*1966*	*1967*
Payroll checks cashed and deposited	448,920	509,666	591,749
Alleged unreported income	399,177.21	477,910.47	354,975.32

The Nevele Had Insufficient Funds to Cash Checks

The cash proceeds received from guests in payment of their bills in the form of currency and coin, which consisted of less than 15 percent of a day's receipts, was either deposited in the Nevele checking account or used to pay concessionaires (22). The currency received from guests as payment for their bills was rarely used to cash payroll checks, because it was never sufficient in any given week, and it was usually needed to pay the concessionaires (23).*

Currency could not be drawn from the Nevele bank account to meet the payroll cashing requirements because there was rarely enough surplus funds in that checking account to satisfy these large check cashing needs. For instance, the Haskins & Sells investigation shows that in June of 1965 payroll checks, cashed through the Nevele hotel, were deposited in the Nevele checking account in the amount of $43,124.08 (23).

* If a guest purchased $75 worth of clothing in one of the shops on the Nevele premises, this amount would be included in his hotel bill. When he departed, he would pay his hotel bill in full, but the hotel would then disburse $75 in currency to the concessionaire, after having deposited the full amount in their account. The same procedure would be followed with jewelry and other sundry items purchased in gift shops, drug stores, etc. (14).

Only $11,000 in currency and coin was deposited in the Nevele checking account that same month (23). Furthermore, the bank balance for the Nevele checking account on May 31, 1965 was $20,316.09, and by June 30, 1965 that account was overdrawn in the amount of $12,938.79 (23).* These figures show conclusively that the $43,000 in currency and coin used to cash the payroll checks had to have come from a source other than guest receipts or from the Nevele checking account. Both of these sources were inadequate to supply the $43,000 in cash. Therefore, these funds had to have come from an outside source.

Newly-Discovered Evidence

As pointed out earlier, while counsel was investigating the Nevele Hotel transactions relating to the taxable years 1965, 1966 and 1967, he stumbled onto a financial statement of an enterprise called Nevele Acres, dated December 31, 1973, showing an obligation due and owing from the Nevele Hotel to Nevele Acres in the amount of $1,168,099.48 (25). This entry was investigated and for the first time it was discovered that large transfers of funds were made from Nevele Acres to the Nevele Hotel for the purpose of cashing payroll checks (25).

Pursuing this crucial lead, it was learned that other companies, unconnected with the Nevele Hotel's operation, furnished funds to the Nevele for purpose of fulfilling the large cash demands needed to fund the payroll cashing operation (25). As an example, a company called Golden Gate-Olcott also issued checks payable either to Ben or Julius Slutsky which were ultimately cashed by them and

* The funds in the Nevele banking account were heavily taxed to pay substantial obligations of a current nature, such as food, cleaning, laundry and other expenses separate from the payroll.

the currency used to meet the payroll needs (25). The same was true of another enterprise called the Sun Spa Resort Hotel (25).

These businesses are quite substantial, having income in excess of $2 million for the years in question. However, they, unlike the Nevele, for the most part had a low overhead, small payroll demands, and therefore had funds readily available to meet the payroll cashing needs of the Nevele Hotel (25). Furthermore, the same principals, *i.e.*, Ben and Julius Slutsky, owned these concerns (26). Therefore, these transfers were easily effectuated when cash was needed.

Since the Nevele Acres, Golden Gate-Olcott and the Sun Spa are companies unconnected to the operation of the Nevele Hotel, this newly-discovered evidence was understandably not uncovered. Nevele Acres, the Sun Spa and Golden Gate-Olcott maintained separate sets of books, which were not located at the Nevele Hotel, and employed separate accountants (26).

The Internal Revenue Service never examined the books and records of Nevele Acres, the Sun Spa or the Golden Gate-Olcott (26). As a consequence, anyone investigating the transactions of the Nevele Hotel would not have discovered this critical evidence. The checks were made out, for the most part, to Ben and Julius Slutsky, and cashed by them, and the currency used to meet the Nevele payroll demands (26). There was no reason to record the transaction on the books and records of the Nevele (26). Accordingly, there was no way a person would know of these transfers by examining the *Nevele's* books and records.

On the other hand, Ben and Julius Slutsky had been advised by Louis Bender that the government had no case against them (26, 44, 47, 48). He explained to them that they would succeed at trial, and consequently they were not made aware of the importance of the payroll cashing operation of the Nevele Hotel (26, 44, 46-47). Surely this is understandable in the prosecution of a complex tax case where the government was proceeding on a bank deposits method of prosecution. Ben and Julius Slutsky, who are not accountants, did not anticipate that these transactions would play a critical part in their defense, when they had been advised by their counsel that the government had no case against them (26, 44, 47, 48). Thus it was urged in the court below that this evidence in all respects was new and the failure to learn of this evidence at the time of trial was not due to the appellants' lack of diligence.

On July 23, 1974 the Hon. Lloyd F. MacMahon denied the appellants' motion for a new trial, holding that there was an insufficient showing that the evidence was newly discovered and concluding that even if the evidence were newly discovered, it would not have led to an acquittal at a retrial (70-77).

Motion for Reduction of Sentence

On March 19, 1973, the Hon. Lloyd F. MacMahon sentenced each of the appellants under § 4208(a)(2) to five years imprisonment which provides that the appellants shall be eligible for parole at any time. Thereafter on July 22, the appellants filed a motion to reduce or modify their sentences under Rule 35 of the Federal Rules of Criminal Procedure. The motion disclosed facts which either arose since the appellants were sentenced or were unknown to the Court at the time the punishment was imposed.

The Illness of Ben Slutsky

Ben Slutsky, who is 65 years old, has been severely ill since the original sentence was imposed upon him (86). In May of 1973 he was hospitalized with a severe case of hepatitis and suffered several relapses (86). From May of 1973 until January 29, 1974 it was necessary for him to be hospitalized for no less than 73 days on four different occasions (181). These periods of confinement were fully documented by the hospital records of the Horton Memorial Hospital in Middletown, New York (132-176).

Dr. Louis A. Lazar certified that Ben Slutsky's hepatitis was "chronic" and that his health status was "indeed precarious" (178). Dr. Lazar concluded that in his "firm medical opinion", the serving of any prison sentence would imperil Ben Slutsky's health and would inevitably initiate serious complications with his hepatitis which would be critically debilitating (178-179).

Ben Slutsky also suffers from a serious heart ailment and has recently suffered a temporary loss of vision which Dr. Lazar believes is related to coronary insufficiency. A hearing was sought to fully investigate Ben Slutsky's disabilities and to re-evaluate the sentence imposed upon him because of his critical illness.

Comparative Sentences

A comprehensive list of cases where other men were either convicted of similar offenses or more serious crimes and received far more lenient sentences was supplied to Judge MacMahon. Some of the defendants were reputed Mafia leaders others were convicted of crimes involving violence. Twenty-seven cases were listed in appellants'

motion and fully documented (103-108). Some of the defendants are well known to this Court. For instance, Tony "Ducks" Corallo, reputed Mafia leader, corrupting public officials—3 years; Daniel Motto, bribing public officials—2 years; Lauria, loan sharking with acts of brutality against victims—3 years; and Joseph Ruggiero, perjury—3 months.

Leading the list of income tax cases is Spiro Agnew—3 years unsupervised probation, Dominic Fago—18 months; Bernard Remzi—4 months; Jessie Burney—5 years probation; Irving Whalley, Republican Congressman from Western Pennsylvania, mail fraud—3 years probation.

The October 26th Wall Street Journal reported that of 25 tax evasion convictions in the Atlanta Federal Court over the past five years only six defendants were sentenced to prison. In Denver all persons convicted of tax cases for the year 1973 received a minimum of 30 days in prison (106). It was urged that the appellants' sentences should be re-assessed in light of these crucial disclosures.

Ineffectiveness of 4208(a)(2) Sentence

The petition for reduction of sentence divulged the alarming situation found to exist for the 4208(a)(2) sentence. Statistics uncovered in the Report of the United States Board of Parole filed with the Committee on the Judiciary revealed that the average man sentenced under 4208(a)(2) spends *more* time in prison than a person who receives a "regular" sentence (109, 110). The Parole Board's biennial report discloses that in 1972 a man serving a "regular" sentence averaged 24.9 months in prison while a person serving an "(a)(2)" sentence served 25.5 months (110).

Using the Parole Board's figures the Court was shown that a man sentenced to prison for income tax evasion will not be paroled until he serves 30.1 months of his sentence (110). As a consequence the Court was urged to reconsider the sentence imposed upon the appellants because of this serious mistake of fact in the imposition of punishment. A hearing was also sought to fully investigate these claims (112).

On July 24, 1974 Judge MacMahon summarily denied the appellants' motion for reduction of sentence without opinion.

POINT I

The appellants' sentence must be vacated because it is based upon a mistake of fact and was mechanically imposed.

The threshold issue presented by this appeal is one of first impression and involves a novel but significant question in the administration of justice in the second circuit. When Judge MacMahon sentenced both the appellants under the provisions of § 4208(a)(2), he expected that they could, and perhaps would, receive an early parole. He did not know that in fact the appellants would be forced to remain in prison for a *longer* period of time than if he had imposed a "regular" five year sentence. As a consequence a critical mistake of fact was made in the imposition of sentence requiring its vacation.

Section 4208(a)(2) is designed to afford a sentencing judge with the opportunity to make federal prisoners eligible for release before they have served the required one-third compulsory time mandated by § 4202 of Title 18. The legislative history stresses that a prisoner's performance is the prime index for gaining an early release under § 4208(a)(2).* See *Grasso* v. *Norton*, 371 F.Supp. 171 (D.Conn. 1974).

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* Emanuel Celler, the sponsor of this provision, declared that the section would allow a prisoner's release at a date earlier than the one-third sentence time: ". . . should the prisoner's response to the rehabilitation program justify it." *Hearings on H. R. J. Res. 424, H. R. J. Res. 425 and H. R. 8923 Before Subcommittee No. 3, House Committee on the Judiciary, 85th Cong., 2d Sess.* (1958).

The Deputy Attorney General Lawrence Walsh, speaking for the Department of Justice, supported the proposal and explained that "It would enable the sentencing judge to select a broad enough range between parole eligibility and maximum sentence in which the board could 'see' [the inmate's] progress and pick that very moment when he is best suited to go back to the community. . . ."

Clearly Judge MacMahon, in employing an "(a)(2)" sentence, did so with the expectation that the parole board would consider the appellants' performance in deciding whether to grant them an early release.* However, the objectives of the (a)(2) sentence have been ignored by the parole board and its well-intended purposes have been perverted. Statistics show conclusively that the average person receiving an (a)(2) sentence serves *more* time in prison then a man who gets a "regular" sentence.

As the chart below decisively shows, the average (a)(2) sentence is *longer* than a "regular" sentence.

	1966	*1967*	*1968*	*1969*	*1970*	*1972*
"Regular" Adult Sentence	17.4	20.8	18.1	19.1	20.7	24.9
Sentence under § 4208(a)(2)	18.7	20.9	18.8	19.0	20.4	25.5

(Figures represent months served)**

The parole board acting in utter defiance of Congress' intent, has simply refused to implement this provision.***

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* Judge Weinfeld, in utilizing an (a)(2) sentence, recently stated: "The parole board . . . determines, based on all significant factors, whether the defendant's response to the institutional program has been such that release on parole" is warranted. *United States* v. *Zacharias*, 365 F.Supp. 256, 257 (S.D.N.Y. 1973).

** United States Board of Parole, Biennial Report at 24 (1970). The biennial report covering July 1, 1970 to June 30, 1972 shows that in 1972 a man serving a "regular" sentence average 24.9 months, while a person serving an "(a)(2) sentence" served 25.5 months.

*** A typical situation is found in the case of *Grasso* v. *Norton*, 371 F.Supp. 171 (D.Conn. 1974), where the court found:

> "An (a)(2) prisoner normally receives his initial consideration for parole shortly after completion of the prison classification study. As in petitioner's case, this occurred less than three months after his incarceration. Obviously, three months is a very brief time to determine whether a prisoner's behavior in prison is sufficiently commendable to warrant the early parole that § 4208(a)(2) authorizes. . . . By considering petitioner for parole after less than three months in prison and *then continuing him until his expiration of a three-year sentence* . . . the board precluded from parole

(Footnote continued on following page)

Here the appellants, two brothers in their middle sixties, with no prior violations, convicted of a non-violent offense, will have to serve *more* time in prison than a person who received a regular five-year sentence. That certainly could not have been Judge MacMahon's intention. Both the Slutskys are serving sentences contrary to the wish and will of Judge MacMahon because of a crucial mistake made in sentencing.

An appellate court must vacate a sentence where the punishment was based upon a misconception of the sentencing statute. *United States* v. *Lewis*, 392 F.2d 440 (4th Cir. 1968). Sentences have also been abrogated when the judge acted under a misunderstanding of the law. *Robinson* v. *United States*, 313 F.2d 817 (7th Cir. 1963). It is not beyond the power of a federal appellate court to vacate a sentence based upon clearly erroneous criteria. *United States* v. *Wiley*, 278 F.2d 500 (7th Cir. 1960). And this Court has previously required a district court to reconsider its sentence when it appeared that the court may have considered improper factors. *McGee* v. *United States*, 462 F.2d 243 (2nd Cir. 1972).

In such cases this Court has exercised its power to review sentences for the failure of the district judge to properly exercise its discretion. *United States v. Brown*, 470 F. 2d 285 (2d Cir. 1972). See also, *United States* v. *Wilson*, 450 F.2d 495 (4th Cir. 1971); *United States* v. *Williams*,

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(Footnote continued from preceding page)

decision-making in his case his prison performance over a length of time sufficient to satisfy the purposes of § 4208(a)(2)." (*Grasso* v. *Norton*, 371 F.Supp. at 174; emphasis supplied).

The court went on to stress:

"But the decision to continue him to expiration of his three-year sentence frustrates the purpose of § 4208(a)(2) because petitioner now has lost the chance to demonstrate that his performance in prison over some substantial length of time justifies parole. He is thus now worse off than if he had not received the benefit of § 4208(a)(2). That situation is not merely ironical; it is illegal." (*Grasso* v. *Norton*, 371 F.Supp. at 174).

407 F.2d 940 (4th Cir. 1969); *Coleman* v. *United States*, 357 F.2d 563 (D.C. Cir. 1965); *In re Minnis*, 7 Cal. 2d 636, 498 P.2d 997, 107 Cal. Rptr. 749 (1972).

Although these cases involve different factual settings, the spirit of their holdings are compatible with the principle we urge here. Of particular significance is some of the language from this Court's judgment in *United States* v. *Malcolm*, 432 F.2d 809 (2d Cir. 1970) where the Court vacated a sentence because the trial judge was apparently mistaken about the defendant's prior criminal record. In that instance, Judge MacMahon (the sentencing judge in this case) stressed:

> "Appellate courts, however, do have power to review a denial of collateral relief on a claim that a sentence is the product of procedures inconsistent with due process of law . . . [or when] it was infected with fundamental defects resulting in a miscarriage of justice, and whether it was consistent with rudimentary demands of fair procedures. (Citing authorities)" (432 F.2d at 815.)

Judge MacMahon went on to state:

> "Misinformation or misunderstanding that is materially untrue regarding a prior criminal record, or *material false assumptions as to any facts relevant to sentencing*, renders the entire sentencing procedure invalid as a violation of due process." (432 F.2d at 816, emphasis supplied.)

And finally Judge MacMahon emphasized:

> "The result of the procedural irregularity is that the sentence rests on a foundation of confusion, misinformation and ignorance of facts vitally material to mitigation. If justice is to be done, a sentencing judge should know all the material facts. The information which was curtailed and precluded here should therefore have been received and considered. Fair administration of justice demands that the sentencing judge

> will not act on surmise, misinformation and suspicion but will impose sentence with insight and understanding. *Harris* v. *United States,* 328 U.S. 162, 166, 86 S.Ct. 352, 15 L. Ed. 2d 240 (1965)." (432 F.2d 819.)

Judge MacMahon, in sentencing appellants, was equally misinformed and ignorant of crucial facts essential to his judgment. When he ordered the appellants confined under § 4208(a)(2), he rejected the requirement of the appellants serving a mandatory one-third of their term before becoming eligible for relief. He relied upon the meritorious relief clause of an (a)(2) sentence which provides the means for a prisoner to earn a quick release based upon good prison performance. However, his intentions have been frustrated by the parole board's practices and the net effect is that appellants will serve *more* time than a person who receives a regular sentence. Thus, this much-heralded judicial discretion is a fiction, and as a consequence this mistake of fact has seriously infected Judge MacMahon's sentence. Accordingly, the appellants have been denied due process of law.

The New Parole Guidelines

This serious mistake of fact inherent in the sentencing of appellants is compounded by the creation of new parole guidelines in April, 1974. At that time the Board of Parole adopted new standards for judging the release of prisoners.* The Board has classified all the federal crimes in groupings based upon the severity of the offense and bearing the following labels: low, low-moderate, moderate, high, very high, and greatest.**

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* These guidelines are catalogued in 39 Fed. Reg. 20028 (June 5, 1974).

** For example, Immigration Law violations are classified as "low"; Selective Service Act violations, "low-moderate"; Bribery of Public Officials, "moderate"; Organized Vehicle Theft, "high"; Robbery, "very-high"; Aircraft highjacking, "greatest".

Against the severity of the crime is weighed the "offender's characteristics" or low risk factor based upon such features as: no prior convictions, no history of drugs, education, family ties, employment, and other similar social factors. A perfect score for offender characteristics is 11 points, (very good); 8-6 points (good); 5-4 points (fair); and 3-0 points (poor).

The board has established a scale whereby these countervailing features are balanced against one another. For instance, a person convicted of robbery (offense severity—"very high") with a "fair" offender characteristic, would serve 26-32 months before he is eligible for release.

Incredible as it may seem, the new parole guidelines do not in any way take into consideration an (a)(2) sentence. The board, stubbornly continuing its distaste for the (a)(2) sentence, has completely ignored this remarkable provision in creating its magic formula for parole. These rigidly fixed release times are now applied in 92%-94% of the cases evaluated for parole. *Grasso* v. *Norton*, 376 F. Supp. 116 (D. Conn. 1974).

Since Ben and Julius Slutsky have been convicted of income tax evasion involving an amount of over $100,000, we are advised that they will be classified as "very high" and based upon an 11 point offender characteristic score, they will not be eligible for release until they have served between 20 and 26 months in prison. Had they received a straight five year sentence, they would have been eligible for parole after they had served 20 months.*

Since both the Slutskys have earned an "11" salient factor rating, they are, in effect, adjudged ready to re-

* Income tax evasion involving an amount less than $50,000 is classified as "moderate". Evasion up to $100,000 is classified as "high"; and we are told anything over that goes into the category of "very high".

turn to society.* Accordingly, the Slutskys under an (a)(2) sentence should be released within 4-5 months.** Both because of the parole board's refusal to implement an (a)(2) sentence in accordance with congessional intent, and because of its own arbitrary guidelines, the Slutskys will have to remain in prison for approximately 26 months. This deplorable situation is so patently at odds with the manifest intent of an (a)(2) sentence as to call for immediate corrective action by vacating the sentence.

It has been said that justice is measured in many ways, but to a convicted man its surest measures lies in the fairness of the sentence he receives. *Sheppard* v. *United States*, 257 F.2d 293, 294 (6th Cir. 1958). The enlightened and civilized considerations inherent in an (a)(2) sentence should be real and not nominal.

The deterrent feature of a five year sentence (whatever it may be) is gained at the time the judgment is imposed and publicized. We are now concerned with other social imperatives such as rehabilitation, and social readjustment. Each of these considerations are compatible with an early release of two men who are in their mid-sixties, have never committed a crime before, will ultimately pay any tax owed to the government and are able to return to their families where they are desperately needed. They of course will remain under the supervision of the parole board for a full five years. The only concern now is rehabilitation and the necessary assurances that they are no longer a threat to the community.

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* Neither have any prior convictions, prior incarcerations, parole revocations or history of heroin; both are college graduates with employment and wives and children awaiting their release.

** Although under an (a)(2) sentence a prisoner can be released within 30 days, classification normally takes 2 months and the release procedures consume another 60 days.

Another basis for invalidating the appellants' sentences is based upon the trial court's employing a "fixed and mechanical approach of imposing sentence rather than a careful appraisal of the variable components relevant to the sentence upon individual basis." *United States* v. *Schwarz*, Docket No. 74-1455 (2d Cir., July 23, 1974); *United States* v. *Baker*, 487 F.2d 360 (2d Cir. 1974); *Woolsey* v. *United States*, 478 F.2d 139 (8th Cir. 1973); *United States* v. *Brown*, 470 F.2d 285 (2d Cir. 1972). Although Judge MacMahon may not have realized that he was employing a mechanical approach by reason of his use of an (a)(2) sentence, in reality he is, for because of the parole board's defiance of 4208(a)(2), the result is the same. Accordingly, appellants' sentences should be vacated.

We must never become so fascinated with the art of our enterprise that we lose sight of its human goals. Here two elderly men who never harmed anyone, have been clapped into prison and will be unlawfully confined there for at least two years because of a misunderstanding of the application of an "(a)(2)" sentence by Judge MacMahon. Common sense and human decency dictate that the sentence be vacated with direction that their sentences be reconsidered in light of the parole board's refusal to implement the provisions of § 4208 (a)(2).

Under the circumstances of this case we respectfully request that the resentencing be assigned to another judge "both for the judge's sake and for the appearance of justice." *Mawson* v. *United States*, 463 F.2d 29, 31 (1st Cir. 1972); *United States* v. *Schwarz*, *supra*.

POINT II

The District Court abused its discretion in imposing such a harsh sentence upon the appellants, and therefore this Court should reduce it.

The time has come for this Court to abandon the obsolete rule of non-review of sentences. We ask that this Court review the ruthless punishment imposed upon Ben and Julius Slutsky and reduce it. Section 2106 of Title 28 empowers the Court to exercise that authority. This case, better than any other, illustrates the "extreme anarchy of sentencing" and calls for this Court's immediate intervention.*

The sawdust rule of non-review has become greatly eroded by the tides of severe sentences in this circuit during the last decade. In that time an increasing number of courts have adopted the policy of appellate review.** The number of state jurisdictions authorizing the review of sentences has grown to 25.*** Canada, France, Italy, India, Japan and Pakistan, to name only a few countries, allow for the review and modification of sentences on appeal. "The United States is the only nation in the free world where one judge can determine conclusively, decisively and finally the minimum period of time the defendant must

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* W. Zumwalt, *Anarchy of Sentencing in the Federal Courts*, 57 JUDICATURE 96 (1973).

** *Woolsey* v. *United States*, 478 F.2d 139 (8th Cir. 1973); *United States* v. *McKinney*, 466 F.2d 1403 (6th Cir. 1972); *United States* v. *Daniels*, 446 F.2d 967 (6th Cir. 1971); *United States* v. *McCoy*, 139 U.S.App.D.C. 60, 429 F.2d 739 (D.C.Cir. 1970); *Thomas* v. *United States*, 368 F.2d 941 (5th Cir. 1966); *Leach* v. *United States*, 334 F.2d 945 (D.C.Cir. 1964); *United States* v. *Wiley*, 267 F.2d 453 (7th Cir. 1960).

*** Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Missouri, Montana, Nebraska, New Jersey, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Wisconsin.

remain in prison, without being subject to any review of his determination."*

This irresistible judicial force, which is gaining momentum day by day, reflects a recognition by the courts, the organized bar, state legislatures, and other countries, that there should be a finer and surer application of justice regarding the punishment of a criminal offender. This principle gains its primary impulse from a desire to reduce the number of misjudgments in our criminal justice system drastically affecting lives of men and woman. We know that every human judgment in the law stands on the edge of error. Experience has taught us that by multiplying judgments we reduce that margin of error.

The antiquated rule against sentence review, which belongs in Dickens' Bleak House, has been subjected to relentless criticism. Today that covert subject has been dragged out of the dark ages of our law, yelling and screaming, and has been exposed to the bright sunlight of critical inspection and re-examination.**

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* Chief Judge Irving Kaufman, *A Symposium of the Judicial Conference of the United States Court of Appeals for the Second Circuit*, 32 F.R.D. 249, 260-261 (1962).

** M. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973); Burr, *Appellate Review as a Means of Controlling Criminal Sentencing Discretion—A Workable Alternative*, 33 U. PITT. L. REV. 1 (1971); Colwin, *Disparity in Sentences and Appellate Review of Sentencing*, 25 RUTGERS L. REV. 207 (1971); Comment, *Appellate Review of Sentences Imposed by the Trial Court*, 48 J. URBAN LAW 536 (1971); Tydings, *Ensuring Rational Sentences—The Case for Appellate Review*, 53 JUDICATURE 54 (1969); Hruska, *Appellate Review of Sentences*, 8 AM.CRIM.L.Q. 10 (1969); Mueller & Poole, *Appellate Review of Legal but Excessive Sentences: A Comparative Study*, 21 VAND. L. REV. 411 (1968); Thomas, *Appellate Review of Sentences and the Development of Sentencing Policy: The English Experience*, 20 ALA. L. REV. 193 (1968); Weigel, *Appellate Revision of Sentences: To Make the Punishment Fit the Crime*, 20 STAN. L. REV. 405 (1968); Levin, *Towards a More Enlightened Sentencing Procedure*, 45 NEB. L. REV. 499 (1966); Sobeloff, *A Recommendation for Appellate Review of Criminal Sentences*, 21 BROOKLYN L. REV. 2, 8 (1955); Sobeloff, *The Sentence of the Courts: Should There be Appellate Review*, 41 A.B.A.J. 13 (1955); Hall, *Reduction of Criminal Sentences on Appeal I*, 37 COLUM. L. REV. 521 (1937).

(Footnote continued on following page)

A questionnaire on appellate review was submitted to the judges attending the Judicial Conference of the Court of Appeals for the Second Circuit in September of 1962 on the question, "Should there be some review of sentences?" Thirty-eight judges (7 circuit, 31 district) voted yes. Six (1 circuit, 5 district) voted no.* Members of this Court should not allow the mere non-feasance of the Supreme Court to intimidate them to act in opposition to the dictates of their own collective conscience.**

Just as appellate judges are expected to forge a composite view in other areas of the law, they should develop a more uniform approach to the perplexing problem of sentencing. Such a judgment, involving the most terrifying sanctions that can be imposed by a civilized society, should be subject to review in the same fashion as other judgments involving the fixing of bail, rulings on evidence, pretrial motions, and other decisions ordinarily made by a trial court.

Apart from the constitutional, statutory and supervisory basis of power to review sentences, there are other persuasive reasons that support appellate re-examination. Not only will trial courts receive better leadership under

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(Footnote continued from preceding page)

In 1968 the American Bar Association approved a report favoring appellate review of sentences and formulated standards.

The Hon. Lawrence W. Pierce, of this district, addressing the American Correctional Association this year, disclosed that sentences in the United States are generally the longest of any industrialized nation and criticized some of the sentences in the Southern District. 15 Cr.L. 2127.

The Hon. Marvin Frankel, one of the most distinguished jurists in this district, has attacked the sentencing process in our country in his book, CRIMINAL SENTENCES: LAW WITHOUT ORDER, which is a major contribution to the literature of the law governing sentencing.

* Symposium, *Appellate Review of Sentences*, 32 F.R.D. 249, 319 (1962).

** The non-review doctrine has been articulated primarily by the courts of appeal; the Supreme Court's responsibility for the doctrine is limited to merely dicta. *United States* v. *Tucker*, 404 U.S. 443, 447 (1972); *Gore* v. *United States*, 357 U.S. 386, 393 (1958); *Blockburger* v. *United States*, 284 U.S. 299, 305 (1932).

formulated guidelines for the sentencing process, but other errors will be readily apparent and easily corrected on appeal. It seems unlikely that the availability of procedural review would generate a large number of time-consuming appeals.

The general doctrine of non-review is in disrepute. Many appellate judges, including one outstanding member of this Court, have acknowledged that the rule against review is so uncongenial that when faced with excessive but legal sentences, they tend to comb the trial record closely in search of an error upon which to base a reversal of a conviction.*

This Court, as the colossus of the circuit courts, should take the lead and lend its steadying voice to this disordered area of the law which is out of joint with modern social imperatives. Our courts can no longer afford to remain silent. To do nothing is to condone merciless sentences which are inhumane and shame our civility.

This Court crossed the Rubicon of this issue in *United States* v. *Schwarz*, Docket No. 74-1455 (2d Cir., July 23, 1974), when it reversed a drastic sentence imposed upon a young girl convicted of a drug offense. The Court there concluded that the trial judge had "employed a fixed and mechanical approach in imposing sentence, rather than a careful appraisal of the valuable components relevant to the sentence upon an individual basis." (*Id.*, slip op. at 4964.) The *Schwarz* opinion marches on to the irresistible conclusion: "This situation requires us to *invalidate* the sentence." (*Id.*, slip op. at 4964; emphasis supplied.)

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* The Hon. Charles E. Clark, formerly of this Court, urged:
"In weighing whether the error is prejudicial, we have allowed an unusually harsh sentence to turn the balance." *United States* v. *Hoffman*, 137 F.2d 416, 422 (2d Cir. 1943). *See also, Nash* v. *United States*, 54 F.2d 1006 (2d Cir. 1932); Hall, *Reduction of Criminal Sentences on Appeal II*, 37 COLUM. L. REV. 762, 774-775 (1937).

The bright glare from this fearless opinion has lit up the whole firmament of the law of sentencing and has re-ignited the fires of concern over insufferable sentences originally banked in *McGee, Gervasi, Driscoll* and other cases in this circuit.* *Schwarz* forms the flashpoint for the overthrow of this discredited regime of non-review.

The existence of such a crude rule allows one district judge within a circuit to exploit a form of feudal power to the detriment of all other courts and thus our system of justice is victimized. Here the veil of justice was torn by the casting into prison of two old men for five years and the law's worst brutality was exposed. District judges must be reminded that the exercise of this awesome power is not beyond reproach. For the survival of any enlightened system of justice is dependent upon the responsible wielding of authority. Review of that exercise of force encourages its responsible use, whereas unsupervised sentencing is bound to sponsor abuse. Thus, the sentences of appellants should be reviewed and modified.

Here two men with perfect records and fine families have been condemned to prison for five years. Under the classification of "white collar crimes" in the parole board's bienniel report, Table XIII, it is revealed that those defendants serve almost half of the prison time levied upon them.** That means that the appellants will spend approximately 30 months in prison. As a result, the appellants will serve more time in prison than Tony "Ducks" Corallo, reputed Mafia leader; Daniel Motto, labor racketeer; Henry

* The menace of barbarous sentences has stalked across pages of this Court's reports for over a decade. *United States* v. *Gervasi*, 495 F.2d 762 (2d Cir. 1974); *United States* v. *Driscoll*, 496 F.2d 252 (2d Cir. 1974); *United States* v. *Kaylor*, 491 F.2d 1127 (2d Cir. 1974); *McGee* v. *United States*, 462 F.2d 243 (2d Cir. 1972); *United States* v. *Dzialak*, 441 F.2d 212 (2d Cir. 1971).

** United States Board of Parole, Biennial Report (1970) at p. 24. See page 110 of the appendix.

Fried, corrupter of public officials; Ferris Alexander, dealer in pornography; and Jesse Smith, extortionist.* Everyone must concede that such a realization is electrifying. None of the defendants mentioned above were of the age and background, nor had they performed the acts of charity that both the appellants are so well known for. Many of the crimes mentioned above are far more serious and in some instances involved violence. Here we have been able to show that there is no tax due and owing, and even if there were, it would be recouped by the government in a civil proceeding.

In 1972 a sentencing study of the Southern District of New York, conducted by Whitney North Seymour, Jr., disclosed that the average sentence for those convicted of income tax evasion with no prior record was *5.9 months*!** The national average sentence for income tax evasion in all federal courts for the year 1972 was *10.4* months.*** The appellants have been sentenced to 60 months imprisonment.

The national average sentence for a person convicted of a narcotics offense is 46.4 months and the average sentence in the Southern District of New York is 62.4 months. The appellants received *longer* sentences than the average person convicted in the United States for bail jumping, bank embezzlement, bribery, counterfeiting, forgery, narcotics, perjury and rackets and extortion. Of all the crimes classified in the Southern District of New York, the appellants only received a lesser sentence than those convicted

* See our table of comparative sentences set forth at pages 103-105 of our appendix.

** Seymour, *1972 Sentencing Study for the Southern District of New York*, 45 N.Y.S.B.J. 163 (April 1973).

*** The national figures are taken from the Annual Report of the Director of the Administrative Office of the United States Courts. The figures for the Southern District of New York are based upon those compiled by Mr. Seymour. We have reproduced this chart and appended it to this brief as Appendix A.

of bank robbery (69.6 months) and narcotics (62.4 months). It is staggering to believe that the average bank robber and drug pusher convicted in New York receive sentences that are only nine months and two months longer than the punishment imposed upon the Slutskys. As a consequence, this case, better than any other, points up the inequities in our sentencing system and the desperate need for some appellate supervision.

The great emphasis today upon uniform sentences is based upon the concept of equal protection under our law. It is manifestly unjust that one man can be condemned to prison for five years for tax evasion, while all others receive sentences less than a year in length or are placed on probation.* The President's Commission on Law Enforcement and Administration of Justice, in their Task Force Report, stated:

> "The correctional strategy that presently seems to hold the greatest promise, based on social science theory and limited research, is that of re-integrating the offender into the community. A key element in this strategy is to deal with problems in their social context, which means in the interaction of the offender and the community. It also means avoiding as much as possible the isolating and labeling effects of commitment to an institution. There is little doubt that the goals of re-integration are furthered much more readily by working with an offender in the community than by incarcerating him." (THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 28 1967)

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* As an example, the Hon. Walter E. Hoffman, in sentencing Spiro Agnew on charges of income tax evasion, stated on October 10, 1973:

> "We come then to the charge of income tax evasion which, as I stated, is a felony and a most serious charge in itself. In approving the plea agreement . . . I have not overlooked my prior writings and sentences in other income tax cases. Generally speaking, where the defendant is a lawyer, a tax accountant or a business executive, I resort to the practice of imposing a fine, and a term of imprisonment but provide that the actual period of confinement be limited to a period of from two to five months, with the defendant being placed on probation for the balance of the term." (New York Times, October 10, 1973)

The American Bar Association's Committee on Standards for Criminal Justice has concluded:

> ". . . probation is properly viewed as a sentence just like any other sentence. It is an attempt by society to impose a sanction which will accomplish its goals, just as any other sentence is designed to do. The fact that it differs from other sentences in that the defendant remains subject to a prison term if he does not comply with the conditions of his release does not suggest or require the need for confusing terminology." ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PROBATION 25 (Approved Draft 1970).

The Committee carefully enumerated many of the reasons why probation is desirable by stating:

> "Desirability of Probation.
>
> Probation is a desirable disposition in appropriate cases because:
>
> (i) it maximizes the liberty of the individual while at the same time vindicating the authority of the law and effectively protecting the public from further violations of the law;
>
> (ii) it affirmatively promotes the rehabilitation of the offender by continuing normal community contacts;
>
> (iii) it avoids the negative and frequently stultifying effects of confinement which often severely and unnecessarily complicate the reintegration of the offender into the community;
>
> (iv) it greatly reduces the financial costs to the public treasury of an effective correctional system;
>
> (v) it minimizes the impact of the conviction upon innocent dependents of the offender."
>
> (STANDARDS RELATING TO PROBATION 27)

This tidal wave of authority, carefully researched and studied, compelling probation in cases where the offense is non-violent and the defendant is capable of rehabilitation, grows day by day.*

In light of these compelling authorities, there is no rational basis for the pitiless sentences inflicted upon the appellants.

The lives of Ben and Julius Slutsky have been ruined by the calamity of these convictions.** They have been disgraced and have drunk their shame to the dregs. Their families have been broken and shattered by this tragedy. There is nothing more that can be done to them—they have been robbed of everything. To keep these two elderly men, one of whom is critically ill, penned up in a cage is uncivilized. It accomplishes no purpose. At their age, they cannot endure confinement. A humane system of justice should allow them to spend their remaining days with

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* NEW YORK STATE DIV. OF PROBATION, DEP'T OF CORRECTION, AN EVALUATION OF PROBATION SUCCESS: A STUDY IN POST-DISCHARGE RECIDIVISM (1964); THE RESULTS OF PROBATION (L. Redzinowitz ed. 1958); J. RUMNEY & MURPHY, PROBATION AND SOCIAL ADJUSTMENT (1952); M. GRUNHUT, PENAL REFORM 309-12 (1948); 2 ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES: PROBATION (1939); COMMISSION ON PROBATION, REPORT ON THE PERMANENT RESULTS OF PROBATION, MASS. SENATE DOC. No. 431 (1924); Scarpitti & Stephenson, *A Study of Probation Effectiveness*, 59 J. CRIM. L.C. & P.S. 361 (1968); Davis, *A Study of Adult Probation Violation Rates by Means of the Cohort Approach*, 5[illegible] J. CRIM. L.C. & P.S. 70 (1964); England, *What is Responsible for Satisfactory Probation and Postprobation Outcome?*, 47 J. CRIM. L.C. & P.S. 667 (1957); Diana, *Is Casework in Probation Necessary?*, 34 FOCUS 1 (1955); England, *A Study of Postprobation Recidivism Among Five Hundred Federal Offenders*, 19 FED. PROB. (Sept. 1955), at 10; Caldwell, *Preview of a New Type of Probation Study Made in Alabama*, 15 FED. PROB. (June 1951), at 3; Monachesi, *A Comparison of Predicted with Actual Results of Probation*, 10 AM. SOC. REV. 26 (1945); Hughes, *An Analysis of the Records of Some 750 Probations*, 13 BRIT. J. ED. PSYCH. 113 (1943); Gillin & Hill, *Rural-Urban Aspects of Adult Probation in Wisconsin*, 5 RURAL SOC. 314 (1940); Menken, *The Rehabilitation of the Morally Handicapped*, 15 J. CRIM. L.C. & P.S. 147 (1924).

** It is a matter of public record that the appellants were forced to divest themselves of their interest in the Nevele Hotel because it holds a state liquor license. Ben Slutsky resigned as chairman of the New York State Bridge Authority and both appellants resigned as directors of the Monticello Raceway.

their families where they are so desperately needed. There they will be able to serve their community, as they have in the past. In this way society gains and the government really loses nothing.

For all these reasons, it is most respectfully urged that the appellants' sentences be reduced to time served and that they be released and placed on probation for the remainder of their term.

POINT III

The Trial Court's denial of a hearing in connection with the motion for a new trial was error because issues of fact were presented.

The convictions of Ben and Julius Slutsky raise the gravest constitutional doubts. Our newly discovered evidence shows conclusively that the entire tax deficiency claimed by the government is fully explained by the deposit of cashed payroll checks in the Nevele's checking account. We have carefully pointed out in our statement of facts how the government merely tabulated all the appellants' bank deposits and after reducing that sum by easily identifiable non-income items, charged the entire remaining amount as income without any reasonable basis for doing so.

The government grievously failed to investigate over 8 million dollars in deposits in the Nevele bank account. The ironclad facts furnished to the Court proving that there was no tax defiiciency were fully verified by affidavits. Haskin & Sells, one of the most reputable accounting firms in the nation, audited the Nevele accounts and certified the amounts of payroll checks cashed and deposited in a Nevele checking account. They further verified that this fully accounted for the tax deficiency charged by the government.

This critical proof was uncovered quit accidentally when counsel was investigating some of the Nevele's transactions in preparation of the petition for certiorari. The payroll cashing leads were traced back to several businesses that supplied large sums of cash to the Nevele to meet these financial demands. These companies, as pointed out in our fact situation, were unconnected to the opera-

tion of the Nevele and therefore the newly discovered evidence was understandably not detected by the appellants' trial counsel.

On the other hand, Ben and Julius Slutsky had been advised by their attorney that the government had no case against them (26, 44, 47, 48). As a consequence, they were not made aware of the importance of the payroll cashing operation of the Nevele. This was understandable in the prosecution of a complex tax case where the government was proceeding on a bank deposit method of prosecution. Neither Ben nor Julius Slutsky are accountants and neither anticipated that these transactions would play a critical part in their defense. Accordingly, it was reasonably urged in the court below that this evidence in all respects was new and the failure to learn of it was not due to the appellants' lack of diligence.

In order to secure a hearing on a motion for a new trial a *prima facie* case must be established showing that the crucial evidence was (1) discovered after trial, (2) could not, with due diligence, have been discovered earlier, (3) is material to the issue litigated and (4) would have probably affected the integrity of the verdict at trial. *United States* v. *Costello*, 355 F.2d 876 (2d Cir., *cert. denied* 357) U.S. 937 1958); *Taylor* v. *United States*, 487 F. 2d 307 (2d Cir. 1973); *Johnson* v. *United States*, 207 F.2d 314 (5th Cir. 1953).

We recognize that there is a high mortality rate for new trial motions and that they are not looked upon with kindness by appellate courts. *United States* v. *Catalano*, 491 F.2d 268 (2d Cir. 1974). But our judicial system is littered with the wreckage of men's lives who have been unjustly

convicted of crime and this terrifying realization warrants the continuous re-examination of cases where men have been tragically misjudged.*

In our case it is undisputed that the evidence was discovered after trial; is critical to the central issue of the case, and would clearly result in the acquittal of the appellants in a retrial.**

The trial court, in denying appellants' motion became preoccupied with the question of whether this evidence should not have been unearthed prior to trial. It is always difficult in a complex case of this nature to set forth in writing why certain remote facts were not discovered by another lawyer who tried the case. However, at a hearing appellants were prepared to prove convincingly that in the context of this whole case it is easily understood how this important evidence remained uncovered.

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* The late Mr. Justice Frankfurter, while a professor of law at Harvard University wrote:

> "All systems of law, however wise, are administered through men, and therefore may occasionally disclose the frailties of men. Perfection may not be demanded of law, but the capacity to correct error of inevitable frailty is the mark of a civilized legal mechanism. Grave injustices, as a matter of fact, do arise even under the most civilized systems of law and despite adherence to the forms of procedure intended to safeguard against them." (F. FRANKFURTER, THE CASE OF SACCO AND VANZETTI, University Library Ed., 1962)

** The trial court erroneously concluded that this crucial evidence would not have affected the outcome of the trial because there was no showing that the funds from these separate enterprises was "not part of that income." Whether or not these funds were income to these other businesses would not affect its non-income quality to the Nevele Hotel and Ben and Julius Slutsky as principals in that enterprise.

The trial court further complained that these transfers of funds were not documented. It was indicated to the court that these transfers could be verified by checks and other instruments. However, there is a limit to how much of this evidence can be crowded into motion papers. As it was, our motion papers ran over 54 pages. However, at a hearing all of this proof could have been produced.

The brief reference by the defense during the trial to checks being cashed and deposited in the Nevele account was misconstrued by Judge MacMahon.*

This passing reference to the deposit of checks, in a limited amount, in the Nevele account in no way related to the advances of close to one million dollars made by other enterprises to the Nevele Hotel over a three year period to meet these check-cashing demands. This critical evidence, unrelated to the cash kept on hand, was understandably undiscovered by appellants' trial counsel.

The very least the appellants were entitled to was a hearing on the substantial issues raised by their motion for a new trial. *United States* v. *Troche*, 213 F.2d 401 (2d Cir. 1954); *Taylor* v. *United States*, 487 F.2d 307 (2d Cir. 1973). Because of the complexity of the issues and the magnitude of appellants' claims, it was virtually impossible to store all the information available in a set of affidavits. In a hearing appellants could have presented a mountain of documentary evidence in the form of checks, ledger sheets, bank statements and other certified proof supporting their claim. The incompetence of counsel issue should also have been judicially investigated.

Recently this Court in *Taylor* v. *United States*, *supra*, concluded that a hearing should have been conducted on a motion for a new trial where there were conflicting affidavits. And today it is well-settled, in *habeas corpus* proceedings, if there is a conflict of the facts, a hearing is constitutionally required. *Waley* v. *Johnson*, 316 U.S. 101 (1942);

* Judge MacMahon in his opinion states:

"Samuel Levis, accountant for the Nevele, testified that during the years in question large amounts of cash ($15,000—$18,000 a week) were kept on hand at the hotel to cash payroll and other checks. Yet, defendants made no attempt at trial to attribute those funds to non-income sources, despite the obvious importance of such evidence." (73)

Walker v. *Johnson*, 312 U.S. 275 (1941). In the latter case the Supreme Court stressed:

> "It is true that they [allegations of fact] are denied in the affidavits filed with the return to the rule, but the denials only serve to make the issues which must be resolved by evidence taken in the usual way. They can have no other office. The witnesses who made them must be subjected to examination *ore tenus* or by deposition as all other witnesses. Not by the pleadings and the affidavits, but by the whole of the testimony, it must be determined whether the petitioner has carried his burden of proof and shown his right to a discharge. *The government's contention that his allegations are improbable and unbelievable cannot serve to deny him an opportunity to support them by evidence.*" (312 U.S. at 286, 287; emphasis supplied.)

Hearings were conducted in the United States District Court for the Southern District of New York in the following cases: *United States* v. *Edmund Rosner*, Crim. No. 1030-72 (S.D.N.Y., Bauman, J.); *United States* v. *Goldman and Catalano*, Crim. No. 522-72 (S.D.N.Y., Bauman, J.). In *United States* v. *DeSapio*, Crim. No. 1012-68 (S.D.N.Y., Tyler, J.), a hearing was held on a pre-judgment motion for a new trial,* and in *United States* v. *Polisi (Anthony)*, 416 F.2d 573 (2d Cir. 1969), a new trial was granted even though the new evidence "'probably' would not have produced a different verdict, . . . even though the testimony is more relevant to punishment than guilt, and even though the testimony's primary effect would only be to impeach the credibility of the accomplices . . ." (416 F.2d at 578.)

Our case is even stronger than those cited above because we have shown conclusively in our motion for a new trial

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* See *United States* v. *DeSapio*, 435 F. 2d 272, 286 (2d Cir. 1970). See also, *United States* v. *Burtman*, Crim. No. 435-69 (S.D.N.Y., 1970, Cannella, J.).

that the tax deficiency charged by the government is completely wiped out by the payroll checks cashed and deposited in the Nevele account. In other words, the alleged unreported income, charged by inference, is fully explained by the vast amount of payroll checks deposited in the business account. To have not conducted a hearing in this case in the face of this overwhelming evidence was unpardonable. Certainly this was the very least a civilized system of justice owed to the appellants. Such a hearing would cost the government very little and in this case we urge will ultimately result in a new trial and a verdict of acquittal. For all of these reasons the order of Judge MacMahon should be reversed and the case should be remanded for a hearing on the issues raised in our motion.

Upon a remand of this case to the district court, bail should be granted the appellants pending a determination of the proceedings below. In *United States* v. *Persico*, 339 F.Supp. 1011, 1079-80 (E.D.N.Y. 1972), bail was granted pending an appeal from the denial of a motion for a new trial. Certainly there is sufficient merit in each of the contentions urged in these proceedings to authorize bail pending their resolution. *Cohen* v. *United States*, 82 S.Ct. 518 (1962); *Sellers* v. *United States*, 89 S.Ct. 36 (1968).

Conclusion

Criminal punishment imposed by a judge involves the exercise of one of government's most dangerous powers. In this modern age to suggest that the misuse of that authority should not be subject to review is unthinkable. The rule of non-reviewability is an anachronism and is out of joint with a rational system of law.

We who bear the burden of trying to make whole those who have been harmed must never lose confidence in the capacity of our courts to right a wrong. There lies the genius of our legal process. For we are all the caretakers of our legal system, both lawyers and judges, and although we can take pride in its achievements, we also must bear the responsibility for its failures. The question is—how much longer will this draconian rule of non-review be allowed to cloud the reputation of this Court. The principle we urge is consistent with basic due process and its coming is inevitable. It is just a matter of time. And when this Court takes that vital step forward, courage and example will have played an important rule in that judgment.

For all these reasons the appellants' sentences should be vacated or in the alternative a hearing should be conducted on the motion for a new trial and the motion to reduce the sentence and bail should be afforded the appellants pending the disposition of those matters.

Respectfully submitted,

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Appendix A

1972 SENTENCING STUDY FOR THE SOUTHERN DISTRICT OF NEW YORK*

by Whitney North Seymour, Jr.

Disparity in sentencing patterns between different types of offenses, and between SDNY and the national average for Federal Courts.

Offenses	Likelihood of Imprisonment		Average Length of Prison Sentences	
	SDNY*	All Federal Courts**	SDNY*	All Federal Courts**
Bail Jumping	66.7%	66.2%	10.0 months	25.6 months
Bank Embezzlement	23.2%	19.5%	18.0 months	51.3 months
Bank Robbery	82.8%	91.8%	69.6 months	124.1 months
Bribery	25.0%	42.5%	11.0 months	15.1 months
Counterfeiting	51.7%	53.7%	14.8 months	40.3 months
Forgery	41.6%	42.8%	16.8 months	32.0 months
Gambling	37.2%	29.9%	3.3 months	14.5 months
Guns	50.0%	45.3%	28.2 months	32.1 months
Immigration	50.0%	42.8%	2.5 months	6.4 months
IRS	35.4%	36.5%	5.9 months	10.4 months
Interstate	54.8%	43.7%	18.1 months	33.8 months
Narcotics	77.0%	70.6%	62.4 months	46.4 months
Perjury	50.0%	53.0%	5.2 months	28.0 months
Postal	44.3%	40.7%	18.8 months	32.5 months
Embezzlement	43.7%	19.0%	5.0 months	11.6 months
Other	46.3%	47.3%	20.1 months	50.5 months
Rackets & Extortion	55.5%	47.1%	46.2 months	31.2 months
Securities	70.4%	55.4%	31.8 months	38.7 months
Fraud	66.7%	21.5%	20.5 months	—
Theft	100.0%	57.4%	36.5 months	38.7 months
Selective Service	63.3%	27.8%	12.4 months	22.2 months
Totals***	43.8%	43.8%	35.2 months	38.1 months

* Figures for SDNY are based on sentence imposed during six-month period from May-October, 1972.

** Figures for all Federal Courts are based on sentences imposed during the fiscal year ending June 30, 1972 and are from the Annual Report of the Annual Report of the Director of the Administrative Office of the United States Courts. Cases for SDNY are grouped according to classification of offenses as best as can be determined from the data given in the report.

*** Figures in the "total" section include all the crimes committed in both the SDNY and the Federal Courts for the above period which were not enumerated in the chart.

* Published in the NEW YORK STATE BAR JOURNAL (April 1973), pp. 163-171; graph at p. 165.